Supreme Court, U.S.
FILED

No. 091268 APR 7 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL ANDREW FONTICOBA,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ROBERT H. ALEXANDER, III
Counsel of Record for Petitioner
Georgia Bar No. 009009
2470 Windy Hill Rd., Suite 112
Marietta, GA 30067
(770) 955-2100
rha3@att.net

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When the jury is charged on a lesser included offense, whether the trial Judge should be required to give this option on the jury verdict form.

2. Whether or not a life sentence is cruel and unusual punishment where the evidence is undisputed that the injury to the victim did not occur during "the kidnapping".

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE FACTS 2

REASONS FOR GRANTING THE PETITION 5

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE TRIAL COURT GAVE A LESSER INCLUDED CHARGE AND DID NOT PROVIDE AN OPTION OF A LESSER INCLUDED COUNT ON THE VERDICT FORM 5

II. THE COURT SHOULD REVIEW THE CASE TO DETERMINE IF A LIFE SENTENCE BASED ON THE FACTS PRESENTED IS CRUEL AND UNUSUAL PUNISHMENT 6

CONCLUSION 7

APPENDIX

Georgia Court of Appeals Decision ..... App. 1

Denial of Motion for Reconsideration ..... App. 12

Georgia Supreme Court Denial of Writ of Certiorari ..... App. 13

TABLE OF AUTHORITIES

Page

Motion for Reconsideration ..... App. 14

Verdict ..... App. 18

CASES

Jones v. United States, 526 U.S. 227 (1999) 5

Penry v. Johnson, 532 U.S. 782 (2001) 6

Solem v. Helm, 463 U.S. 277 (1983) 6

STATUTES

O.C.G.A. § 16-5-40. Kidnapping 1

OPINION BELOW

The Georgia Court of Appeals did not publish an opinion in this case. All lower court opinions are attached in the appendix.

JURISDICTION

The Georgia Court of Appeals filed its decision on August 14, 2009 and entered, an order denying Petitioner's motion for reconsideration on September 3, 2009. Petitioner filed a writ of certiorari on September 10, 2009 and the Georgia Supreme Court denied Petitioner's writ of certiorari on March 1, 2010. This Court possesses jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. O.C.G.A. §16-5-40. Kidnapping.

(a) A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such a person against his will.

(b) A person convicted of the offense of kidnapping shall be punished by imprisonment for not less than ten nor more than 20 years, provided that a person convicted of the offense of kidnapping for ransom shall be punished by life imprisonment or by death

and provided, further, that, if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

II. The Georgia and the United States Constitutional prohibition against cruel and unusual punishment.

STATEMENT OF THE FACTS

I. The Petitioner, was charged in Cobb County, Georgia, **Indictment Number 07-2247** with kidnapping with bodily injury and battery. In Georgia, kidnapping with bodily injury carries a mandatory life sentence. The Defendant was convicted of kidnapping with bodily injury and received a life sentence. The court charged on the lesser included offense of simple kidnapping, but did not provide this option on the jury verdict form.

II. Angela Fonticoba, the victim, testified that she was the ex-wife of the Petitioner. She testified that the ***Defendant was at her house on three (3) separate occasions on November 28, 2006.***

The first time, he knocked on the door and she told him that she had a friend over and to come back later. The Defendant departed the residence.

The second time, she stepped outside with her cell phone and the Defendant took the phone from her and an argument ensued. She testified, once the

Defendant took the phone from her, he walked away and she grabbed for her phone and then the Defendant hit her in the head with the cell phone. She testified that she was struck in the forehead with her cell phone and the Defendant pulled her hair. She testified, "we were fighting behind the apartment building behind the bushes". She testified, "I think I scratched him". She was asked:

Q: Did he hit you again while this was going on?

A: No. He just – after that was pulling my hair and stuff. He hit me in the head with the cell phone and I think in the lip. I don't remember. If it was the cell phone or his hand, I don't remember what ***hit me in the lip.***

She continued her testimony about this incident and stated that ***the Defendant*** **left her residence, again.**

The third time (the kidnapping), was when she was waiting in her apartment for the police. She testified, she heard a knock on the door, she opened the door thinking that the police had arrived, it was the Defendant. The Defendant told her, "we need to talk" and he started "pulling on me to go" the Prosecutor asked:

Q: When he was pulling on you, what part of your body, how was he pulling?

A: My shirt

On cross-examination the victim testified to the following:

Q: So he wasn't dragging you or pulling you at that time?

A: He was just pulling my shirt. He wasn't yanking me or – just pulling my shirt.

She continued:

Q: So it wasn't like he grabbed you by the arm and physically dragged you –

A: No, he was just pulling me, urging me, come on, come on.

Q: Sort of like, come here, come here, come here?

A: Mm-hmm.

Q: So he wasn't physically dragging you?

A: No.

Trial Transcript.

She testified, "we just went to the car, he was pulling on me and I was crying". They went to her car and started driving around. On cross-examination, she stated, they went to a nearby church together and sat and talked.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE TRIAL COURT GAVE A LESSER INCLUDED CHARGE AND DID NOT PROVIDE AN OPTION OF A LESSER INCLUDED COUNT ON THE VERDICT FORM.

***In Jones v. United States*, 526 U.S. 227 (1999),** Petitioner was charged with, inter alia, carjacking, in violation of 18 U.S.C. §2119, which at the time provided, as relevant here, that a person possessing a firearm who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall – (1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be imprisoned not more than 25 years. The jury instructions at his trial defined that offense by reference solely to §2119(1). After he was found guilty, the District Court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury.

The case was reversed and remanded.

In the instant case, Petitioner was charged with kidnapping with bodily injury, which carries a mandatory life sentence. The jury was given a lesser included instruction of simple kidnapping, which carries a 10 to 20 year sentence. The jury was not provided a lesser simple kidnapping option on the jury verdict form. Petitioner was given a life sentence.

In Jones, supra the court held a jury charge establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Petitioner argues that the instruction given in this case "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." ***Penry v. Johnson*, 532 U.S. 782 (2001)**

II. THE COURT SHOULD REVIEW THE CASE TO DETERMINE IF A LIFE SENTENCE BASED ON THE FACTS PRESENTED IS CRUEL AND UNUSUAL PUNISHMENT.

***In Solem v. Helm*, 463 U.S. 277 (1983),** the court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."

***In the case at bar*,** the Petitioner was given a life sentence because the victim sustained "reddened wrists" and her lip was "actively bleeding." What the lower court ignored that the lip injury was caused earlier in the day, and not as a result of the "kidnapping". In other words, the Petitioner was given a life sentence because the victim received "reddened wrists".

Petitioner implores this court to review his case: such a sentence can only be considered contrary to the principles of fairness and what is right.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Georgia Court of Appeals.

Respectfully submitted,

ROBERT H. ALEXANDER, III
Counsel of Record for Petitioner
Georgia Bar No. 009009
2470 Windy Hill Road, Suite 112
Marietta, GA 30067
(770) 955-2100
rha3@att.net

SECOND DIVISION
JOHNSON, P. J.,
ELLINGTON and MIKELL, JJ.

August 14, 2009

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A09A1777. FONTICOBA v. THE STATE.

ELLINGTON, Judge.

A Cobb County jury found Michael Fonticoba guilty beyond a reasonable doubt of kidnapping with bodily injury, OCGA § 16-5-40(b)(4); and battery, OCGA § 16-5-23.1. Following the denial of his motion for a new trial, Fonticoba appeals, contending the evidence was insufficient, the trial court erred in instructing the jury, and he received ineffective assistance of counsel. For the reasons explained below, we affirm.

1. Fonticoba contends that the evidence was insufficient to find him guilty of kidnapping because "there was no evidence presented at trial that [he] committed the offenses" and "the State did not meet [its] burden of elimination of a reasonable hypothesis that another committed the crime." In addition, he contends that, even if the evidence was sufficient to find him guilty of kidnapping, there was no evidence that the victim received any bodily injury during the kidnapping. Rather, he contends, the evidence demanded a finding that all of the victim's injuries

occurred during the separate. altercation that was the subject of the battery charge, which altercation happened hours earlier than the alleged kidnapping. As a result, Fonticoba contends, the trial court erred in entering judgment against him for the offense; of kidnapping with bodily injury.

> On appeal from a criminal conviction, [the appellate court] view[s] the evidence in the light most favorable to the verdict and an appellant no longer enjoys the presumption of innocence. [The appellate court] determines whether the evidence is sufficient under the standard of *Jackson v. Virginia,* 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979), and does not weigh the evidence or determine witness credibility. Any conflicts or inconsistencies in the evidence are for the jury to resolve. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, [the appellate court] must uphold the jury's verdict.

(Citations omitted.) *Rankin v. State*, 278 Ga. 704, 705 (606 SE2d 269) (2004).[1] The standard of *Jackson v. Virginia* is met if the evidence is sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt of the crime charged. *Clark v. State*, 275 Ga. 220, 221 (1) (564 SE2d 191) (2002).

---

[1] See also OCGA § 24-9-80 ("The credibility of a witness is a matter to be determined by the jury under proper instructions from the court.").

Viewed in the light most favorable to the verdict, the evidence showed that Fonticoba went to the residence of the victim, who is his ex-wife, three times on November 28, 2006. During Fonticoba's first visit that morning, he and the victim spoke briefly; she thought he seemed upset that she had a male friend visiting. During his second visit later that morning, they argued about the victim's having a boyfriend. Fonticoba grabbed the victim's cell phone, dialed her boyfriend's number, and left a message that the victim was "a whore and a prostitute" who was cheating on him. The victim tried to get her cell phone back, and Fonticoba hit her on the forehead with it, pulled her hair, and hit her on the mouth. Fonticoba left. The victim drove her friend to work, then returned home and called the police.

While the victim waited for the police, Fonticoba returned for the third time, around noon. He insisted that he and the victim needed to talk. He forced her to her car, pulling her by the shirt, the hair, and the wrists. She drove to a church parking lot. The officer who responded to the victim's earlier 911 call found that the victim was not home. The officer called the victim's cell phone to locate her. The victim was hysterical and could barely speak. The officer asked the victim to come to the police station; if she failed to appear, he would assume she had been kidnapped and would dispatch additional officers to search for her. Fonticoba had the victim let him out of the car as she drove to the police station. When she arrived there, the officer saw abrasions on her forehead and

cheek, a cut on her lip that was bleeding; and red marks on her wrists where it appeared that someone had recently grabbed her wrists.

The victim's testimony that she did not want to go to her car and leave with Fonticoba, that he took her out of her apartment and into the car against her will, and that she was afraid he would hurt her was sufficient for the jury to find that Fonticoba abducted the victim and held her against her will. *Ellis v. State*, 282 Ga. App. 17, 20 (637 SE2d 729) (2006). Although the victim did not want to testify against Fonticoba, who she said was "just scared," and testified that she did not feel she had been "kidnapped," a victim's belief that a defendant's actions do not merit the label of the charged offense has no relevance to the issue of whether the State proved each of the essential elements of the offense beyond a reasonable doubt. *Gurlaskie v. State,* 196 Ga. App. 794 (1) (397 SE2d 66) (1990).

Furthermore, "[k]idnapping with bodily injury only requires that an injury, no matter how slight, occur during the kidnapping." (Citation and punctuation omitted.) *Phillips v. State,* 284 Ga. App. 683, 685 (1) (b) (644 SE2d 535) (2007). Here, the officer's testimony that the victim reported that Fonticoba dragged her to the car by the arms and that immediately after the kidnapping her wrists were reddened and her lip was actively bleeding authorized the jury to find that the victim was injured during and in connection with the kidnapping. Id. (finding sufficient evidence of physical injury where the responding

officer observed that the victim had a red mark on her cheek, puffiness and redness around her eyes and ears, and red marks from being bound with duct tape); *Culver v. State*, 230 Ga. App. 224, 232-233 (10) (496 SE2d 292) (1998) (finding sufficient evidence of physical injury where a paramedic who attended the victim observed the victim clutching her right hand and noted that her wrist was swollen and red from being grabbed when the defendant twisted her arm behind her back).

2. Fonticoba contends that the trial court instructed the jury that the crime of kidnapping with bodily injury could be committed by either of two methods and that such charge was error because the indictment charged that the offense was committed by one method. Fonticoba misrepresents the record. The trial transcript shows that the trial court instructed the jury as to the essential elements of the offense of kidnapping with bodily injury and as to the definitions of "kidnapping," "abduction," "asportation," "false imprisonment," and "visible bodily harm." The trial court further instructed the jury that, in addition to the offense of kidnapping with bodily injury, it could consider the lesser included offenses of kidnapping and false imprisonment.[2] By instructing

---

[2] On the issue of the lesser-included offense, the court instructed as follows:

> If you do not believe beyond a reasonable doubt that the Defendant is guilty of kidnapping with bodily injury[,] but do believe beyond a reasonable doubt the

(Continued on following page)

the jury regarding the lesser included offenses, the trial court did not instruct the jury that the crime of kidnapping with bodily injury could be committed by either of two methods. This argument lacks merit. *Heard v. State,* 257 Ga. App. 315, 317 (2) (573 SE2d 82) (2002).

3. In Fonticoba's claim that he received ineffective assistance of counsel, he contends that his counsel's performance was deficient in preparing for trial, in cross-examining the victim, in failing to object to character evidence, in failing to develop evidence of the time that elapsed during the incident, in failing to move for a directed verdict, in failing to request certain jury instructions, and in failing to object to the court's charge to the jury.

> Defendant is guilty of kidnapping with bodily injury[,] but do believe beyond a reasonable doubt the defendant is guilty of kidnapping, you would be authorized to find the Defendant guilty of kidnapping[,] and the form of your verdict would be: We, the jury, find the Defendant guilty of kidnapping. . . .
>
> If you do not believe that the Defendant is guilty of kidnapping with bodily injury or kidnapping, but do believe beyond a reasonable doubt that the Defendant is guilty of false imprisonment, then you would be authorized to find the Defendant guilty of false imprisonment[,] and the form of your verdict would be: We, the jury, find the Defendant guilty of false imprisonment.
>
> As to kidnapping and false imprisonment, you would specify that particular offense in your verdict if that is your finding.

> In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the client that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (104 SC 2052, 80 LE2d 674) (1984)[.] The criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. [As the appellate court, we] accept the trial court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts.

(Citations and punctuation omitted.) *Robinson v. State*, 277 Ga. 75, 75-76 (586 SE2d 313) (2003).

(a) Fonticoba contends that his counsel's failure to interview a witness who "may have provided evidence that the victim's injuries occurred the night before" when she had a fight with her current boyfriend constituted ineffective assistance. Fonticoba did not call the witness to testify at the hearing on his motion for a new trial, according to Fonticoba's appellate counsel, because, by that time, the witness no longer remembered the events, nor did Fonticoba otherwise proffer her testimony. Pretermitting whether counsel's performance was deficient, therefore, there is nothing in the record establishing the requisite

prejudice. *McDaniel v. State*, 279 Ga. 801, 803 (2) (c) (621 SE2d 424) (2005) ("Where, as here, the defendant fails to proffer the testimony of an uncalled witness, he cannot prove that there is a reasonable probability that the trial would have ended differently.") (citation omitted.); *Sanders v. State*, 253 Ga. App. 380, 382 (559 SE2d 122) (2002) ("Absent a proffer, defendant cannot meet his burden of making an affirmative showing that specifically demonstrates how counsel's failure would have affected the outcome of his case.") (citation omitted).

(b) Fonticoba contends that his counsel failed to review with him the discovery material provided by the State, failed to discuss any possible defenses with him, and failed to discuss his right to testify. The record does not support this contention. Fonticoba's trial counsel testified that he did all of these things, and there is no evidence to the contrary in the record. Accordingly, this argument fails.

(c) Fonticoba contends that his counsel's performance was deficient in failing to cross-examine the victim about a hand-written statement she gave to the police. Fonticoba's counsel testified that he elicited the information contained in the statement, to the extent it was consistent with his defense strategy. "[A] matter such as the cross-examination of a witness is most often grounded in matters of trial tactics and strategy and, in those instances, provides no basis for finding counsel's performance deficient." *Butler v. State*, 273 Ga. 380, 385 (10) (b) (541 SE2d 653) (2001). Thus, the trial court properly concluded

that this claim of ineffective assistance of counsel has no merit. Id.

(d) Fonticoba criticizes his counsel's failure to object to a question that would elicit evidence of his bad character, specifically, when the prosecutor asked the victim whether Fonticoba had been arrested in February 2003 when the victim reported to the police that he had tried to force her car off the road. Under Georgia law, however, evidence of prior difficulties between Fonticoba and the victim was admissible "to show the defendant's motive, intent, or bent of mind." (Punctuation and footnote omitted.) *Breazeale v. State*, 290 Ga. App. 632, 634 (2) (660 SE2d 376) (2008). "Since the testimony was admissible, an objection to it would have been without merit, and failure to make a meritless objection does not constitute ineffective assistance of counsel." (Punctuation and footnote omitted.) Id.

(e) Fonticoba contends his counsel should have elicited testimony on cross-examination or adduced evidence to show that hours elapsed between his second visit to the victim's apartment, when he battered her with the cell phone and injured her face, and his third visit, when he kidnapped the victim but, according to Fonticoba, inflicted no additional physical injury. The record shows, however, that Fonticoba's counsel adequately established that significant time elapsed between those events.

Fonticoba criticizes his counsel's failure to move for a directed verdict on the charge of kidnapping

with bodily injury. The failure to seek a motion for directed verdict was not deficient performance because, as explained in Division 1, supra, the evidence presented by the State was sufficient to authorize Fonticoba's conviction. *Nelson v. State*, 283 Ga. 119, 121 (2) (a) (657 SE2d 201) (2008).

(g) Fonticoba attacks his counsel's failure to submit written requests for jury instructions regarding the lesser-included offenses of kidnapping, aggravated assault, battery, or mutual combat. The record shows that the trial court did instruct the jury that it could consider kidnapping as a lesser-included offense of kidnapping with bodily injury. Furthermore, as we have held, the elements of the offense of kidnapping, that is, abducting or stealing away any person without lawful authority or warrant and holding such person against his or her will, do not include the elements required to prove aggravated assault, OCGA § 16-5-21, or battery, OCGA § 16-5-23. *Boxer X v. State*, 237 Ga. App. 526, 532-533 (10) (515 SE2d 668) (1999). Finally, a charge on mutual combat was not warranted because there was no evidence that the victim was armed with a deadly weapon and was willing to fight Fonticoba. *Hudson v. State*, 280 Ga. 123, 124 (2) (623 SE2d 497) (2005) ("A charge on mutual combat, however, is warranted only when the combatants are armed with deadly weapons and mutually agree to fight.") (footnote omitted). Where a defendant is not entitled to a particular jury instruction, his trial counsel's failure to seek the instruction cannot constitute the deficient performance

necessary for a successful showing of ineffective assistance of counsel. *Nelson v. State*, 283 Ga. at 121 (2) (b).

(h) Fonticoba contends that the trial court instructed the jury that the crime of kidnapping with bodily injury could be committed by either of two methods and that his counsel rendered deficient performance by failing to object to the charge. As we explained in Division 2, supra, the court's charge was not erroneous in this way. As a result, trial counsel's failure to object did not constitute deficient performance.

Based on the foregoing, we conclude that the trial court did not err in denying Fonticoba's motion for a new trial based on the ineffective assistance of counsel.

Judgment affirmed. Johnson, P. J., and Mikell, J., concur.

Court of Appeals

of the State of Georgia

ATLANTA, SEPTEMBER 03, 2009

The Court of Appeals passed the following order

Case No. A09A1777

MICHAEL FONTICOBA V. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP 03, 2009

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William Martin

[SEAL] SUPREME COURT OF GEORGIA
Case No. S10C0079

Atlanta, March 01, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MICHAEL FONTICOBA v. THE STATE

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur.

Court of Appeals Case No. A09A1777

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese Barnes, Clerk

IN THE

COURT OF APPEALS OF GEORGIA

MICHAEL ANDREW FONTICOBA APPELLANT	:	**CASE NO. A09A1777**
	:	**COBB SUPERIOR COURT**
vs.	:	
STATE OF GEORGIA APPELLEE	:	

MOTION FOR RECONSIDERATION

NOW COMES, the Appellant, Michael Fonticoba, by and through Counsel, Robert H. Alexander, III, files this his "Motion for Reconsideration" of the Judgment of this Court, and shows the Court as follows:

1.

This Motion for Reconsideration is made by virtue of and pursuant to Rule 48 of the Rules of the Court of Appeals of the State of Georgia.

2.

On August 14, 2009, this Court rendered a Judgment adverse to the Appellant, a copy of same being attached hereto and, by reference, made a part of this Motion. This Motion is filed within ten (10) days of the rendition of that Judgment.

3.

It is respectfully submitted and urged that this Court, in reaching the Judgment adverse to Appellant, overlooked material facts and misapplied controlling authority.

4.

The questions to be answered in this appeal were whether or not there was sufficient evidence to convict the Appellant and whether the Court properly charged the jury.

5.

In the Court's decision it held, "kidnapping with bodily injury only requires that an injury, no matter how slight, occur during the kidnapping." Further, the Court concluded that the arresting police officer noticed the victim's wrists were reddened and her lip was actively bleeding. Respectfully, there is no testimony or evidence to support that the injury to her lip happened during the Defendant's third visit to the house. In fact, the testimony and evidence presented at trial was that the injury to her lip occurred during the Defendant's second visit. **(T33 L3-7)**

6.

In all courtesy to the Court, neither Mr. Fonticoba or his Appellant Attorney misrepresented the record. During the jury charge conference, there was a

discussion about the lesser included charge of kidnapping. It is not clear from the record if the trial Court agreed to give a lesser included charge of Simple Kidnapping. Mr. Fonticoba's position is that if the Court had intended on giving a lesser included charge of kidnapping, the jury should have been provided with this option on the jury verdict form. The jury was not given this option on the jury verdict form nor were they instructed during the jury charge if they could "hand write" the lesser included charge of "kidnapping" (see attached jury verdict form).

Under the most extreme circumstances it is difficult to envision someone receiving a life-sentence based on the evidence and facts presented in this case.

CONCLUSION

The Appellant, most respectfully, implores the Court to reconsider the evidence and law in this case, to see the wisdom of the dissenting opinion, grant the Appellant's Motion for Rehearing, and reverse the majority opinion.

Respectfully submitted,

/s/ R. Alexander

ROBERT H. ALEXANDER, III
ATTORNEY FOR APPELLANT

GEORGIA BAR NO. 009009
SUITE 112
2470 WINDY HILL RD.
MARIETTA, GA 30067
(770) 955-2100

IN THE SUPERIOR COURT
OF COBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
v.	*	CRIMINAL ACTION NO.
MICHAEL ANDREW FONTICOBA,	*	07-9-2247-18
	*	
Defendant.	*	

VERDICT

(Filed Oct. 16, 2007)

We, the jury, find the Defendant

guilty as to COUNT ONE.

This 16th day of October, 2007.

/s/ Kenneth Bailey
Foreperson

We, the jury find the Defendant

guilty as to COUNT TWO.

This 16th day of October, 2007.

/s/ Kenneth Bailey
Foreperson